



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Virginia Law Register

VOL. XX.]

APRIL, 1915.

[No. 12

CONTRABAND OF WAR.

Contraband of war, in the conception of international law, consists of those things which, in accordance with the rules which by universal consent are binding on belligerent and neutral States, a belligerent State absolutely or conditionally forbids the subjects of neutral States to carry to her enemy.

The theory of contraband received recognition in very early times (Grotius, *De Jure Belli ad Pacis*, liber III, c. i, § 5) but not until the Middle Ages did the theory find expression in international rules designed to govern the conditions of commercial intercourse between belligerents and neutrals.

While on the one hand neutrals have never tolerated that belligerents should arbitrarily declare what things are to be contraband, on the other the tendency of belligerents has been to enlarge the category of contraband; the result has been that a protracted process of ordinances, conventions and declarations, culminating in the Declaration of London, has secured a fairly authoritative and accurate definition of the things which respectively fall within the category of absolute and conditional contraband.

The law of contraband is international, not municipal in the absence of any treaty to the contrary, the subjects of a neutral State are not forbidden by municipal law from carrying on commercial intercourse with belligerent States in all things contraband, subject to the risk of capture, forfeiture, or other penalty at the hands of the enemy of the State to which they attempt to convey them.

The municipal laws of many States restraining their subjects from fitting out armaments or supplying levies for foreign belligerents are of modern origin and have no relation to contraband, but prior to the enactment thereof the performance of such acts by the subjects of neutral States was not unlawful. (Fortescue's Reports, p. 388, and 7 Wheaton's Reports, 285.) So

again, acts done by a State in its organic capacity in violation of neutrality are outside the law of contraband.

Articles of contraband were defined and divided into two classes by Grotius, viz., those which are useful only for the purposes of war, and those which may be useful for the purposes of war or peace. "*Sunt enim quæ in bello tantum habent usum ut arma, * * * Sunt quæ in bello et extra bellum usum habent, ut pecuniæ, commeatus et naves et quæ navibus adsunt.*" The principle of his division is recognized at the present time, but the progress of science and the fertility of invention has modified and will continue to modify the classification of articles which fall within the two divisions.

Little exception can be taken to the classification of absolute and conditional contraband contained in the Declaration of London; the inclusion of horses and mules in the list of absolute contraband is open to objection, and was sanctioned only by a bare majority of the Conference; it should be noted that the Declaration contains a proviso that "articles and materials exclusively used for war may be added to the list of absolute contraband by means of a notified declaration."

In conformity with the Grotian principle, the Declaration sets out a list of those things which may not be made contraband, *i. e.*, absolute or conditional; that list includes cotton, which Russia in her recent war with Japan declared contraband, and rubber, the use of which for traction is of essential value in modern warfare; metallic ores are also included, this means ores in their crude state and would not cover copper in a manufactured form. (The English Government by recent Order in Council has included rubber and unwrought copper among things contraband.)

The things to which the term absolute contraband is applicable are *de plein droit, i. e.*, without notice on the outbreak of war, prohibited from being carried by neutrals to the territory of a belligerent, and both ships and cargo may be captured, condemned, and confiscated by the belligerents' enemy.

Things to which the term conditional contraband is applicable fall within that category when their destination is of a certain character. Belligerents are authorized by the Declaration of London (Art. 25) to add articles and materials susceptible of use in war, as well as for purposes of peace, to the list of con-

ditional contraband by means of a declaration. Destination is the test alike as to articles liable to be treated as absolute or conditional contraband; it has never ceased to be a vexed question between belligerents, and has at the present time given rise to some friction between England and the United States of America.

The rule which England uniformly accepted and generally observed until the promulgation of the Declaration of London was, that the destination of the ship and not the cargo, both in the case of absolute and conditional contraband, as evidenced by the ship's papers, was to be the sole criterion as to the fate of ship or cargo or both. The sole exceptions to the application of this rule were when the ship was out of the course which her papers indicated she should be on, and on a course to a prohibited place; where from internal evidence the ship's papers were demonstrably fraudulent; where members of the crew make credible admissions as to destination in defeasance of what was stated in the ship's papers.

Against this unambiguous rule neutrals could have no just cause of complaint: no question of intention, of transshipment, of land carriage after discharge of cargo, of proximity of neutral territory to the enemy's territory or forces ever arose; if the ship's destination were to a prohibited territory or place she was amenable, if to a neutral port she was immune.

The doctrine of "continuous voyage," which resulted from the "Rule of the War of 1756," is in no wise inconsistent with the rule that a vessel is only liable to capture when on her course to a prohibited place. In 1756 France, which was in a position of naval inferiority to England, opened its colonial trade to Dutch ships, but excluded other neutrals. The English seized three Dutch ships, on the ground that such privilege trading by neutrals was tantamount to the identification of such neutrals with the enemy, and such ships and their cargoes were adjudged to be lawful prize. The application of this rule against neutrals gave rise to an attempt at evasion by the device of making a colourable importation into some port with which trade was not prohibited, and thence conveying the cargo to the prohibited port. The English Courts held that the destination of the ship was to be ascertained, not by its voyage to the port of colourable impor-

tation, but by that to the prohibited port, and that a vessel seized on its ultimate voyage from the former port was lawful prize.

A case which clearly demonstrates that the doctrine of continuous voyage only justifies the capture of a ship when she is actually on her course to a prohibited place is the *Imina*. (3 C. Robins. 166.) This ship was captured by an English war-vessel when on her course to Emden, a neutral port, which was in close and easy proximity to enemy territory; Lord Stowell (then Sir W. Scott) ordered her release, in spite of the fact that Emden was a facile base of supply for the enemy, and that his court was prohibiting English merchants from sending goods to Emden as coming within the law against trading with the enemy: he observed: "The rule with respect to contraband is, that the articles must be taken *in delicto*, in the actual prosecution of a voyage to the enemy's port."

The perversion of the sound doctrine of "continuous voyage," as expounded by the English Courts, bore its first evil fruits in a case decided by the French Council of Prize during the Crimean War, *The Frau Houwina*. (See Baty, *International Law in S. Africa*, p. 11.) The vessel was captured by a French man-of-war while on her voyage to a neutral port; the French Court did what Lord Stowell declined to do, they observed that the imports of saltpetre and sulphur—with which the vessel was loaded—had gone suddenly up and a brisk trade was being done in these goods with Russia by overland route, and on these grounds the Court condemned ship and cargo. It is noteworthy that these constitute the grounds (*inter alia*) upon which our Foreign Office seeks to excuse its interference with American ships on their voyage to neutral ports.

The Prize Court of the United States of America during their war with the Confederate States, on the false analogy of the English doctrine of continuous voyage, pursued the same course in *The Peterhoff*, 5 Wall, 47, this ship was on her voyage to a neutral port; the Court inferred that the cargo, after being unloaded in the neutral port, might be taken by lighters up a river to the Confederate territory, and therefore it condemned ship and cargo.

This doctrine of intention, founded as it has been and must be on mere conjecture and suspicion, has now been embodied as

part of the Law of Nations in the Declaration of London. Henceforth, the ships of neutral States carrying cargoes to the ports of neutral States are to be exposed to the inconvenience and pecuniary loss of protracted search, and to the very probable event of capture and condemnation, because the naval officer of a belligerent ship chooses to assume that the cargo may be intended for a prohibited place. The new conditions of naval warfare and coast defense have rendered blockade, for all practical purposes, obsolete, with the result that belligerents have manifested a disposition to strengthen in their interest the law of contraband, and the Declaration of London proceeds upon these lines; it enables the belligerent, on the pretext that her cargo is "intended" for her enemy's use, to visit, search and capture a neutral ship in any quarter of the high seas.

Again, convoy has under modern sailing conditions become impracticable, and has not been resorted to for many years.

The right of search constitutes the most delicate and difficult question incident to the law of contraband. It is a right of the belligerent universally acknowledged by nations and publicists, even by Hubner, the uncompromising champion of the privileges of neutrals; the antiquity of the right is unquestionable, and it appears to have been recognized as early as 1164 by the Christian and Mohammedan powers of the Mediterranean. (Twiss, Vol. II. 147, 2nd Edition.)

But although the principle of the right of visit and search is conceded, the application of the principle has been the source of much friction between belligerents and neutrals. The "Armed Neutralities of 1780 and 1800" were the result of the arrogant pretensions of England in reference (*inter alia*) to the exercise of this right. It may in the first place be unequivocally stated that it is the duty of the naval officer of the visiting ship to cause as little inconvenience and delay as possible in the exercise of the right; indeed the English Admiralty rules provide as follows: "In exercising the right of visit, the commander should be careful not to occasion to the neutral any delay or deviation from her course that can be avoided, and generally to cause as little annoyance as possible."

Circumstances may exist which would prohibit expeditious search and involve prolonged detention of the suspected vessel;

obstruction by her crew, boisterous weather rendering the dispatch of an open boat from the warship hazardous; the proximity of enemy men-of-war,—are undoubtedly adequate reasons for what would otherwise be undue detention; in these or cognate cases, the commander of the naval ship may order the neutral vessel to lie to, to lower her flag and steer according to his directions, or to proceed to a named port. (The *Edward and Mary*, 3 Rob. 508 (1801).) These constituted in former wars practically the only valid reason for detention of an innocent vessel beyond the time absolutely necessary for reasonable examination, but modern warfare has afforded another cause justifying prolonged detention, namely, the grave peril to which a warship is exposed from submarine attack in waters where such danger exists; under such circumstances the naval commander would naturally direct the neutral vessel to proceed to the most contiguous port where the right of search might with safety be exercised.

The extent to which the right of search or examination should proceed are as follows:—If upon examination the ship's papers appear to be in order and there are no extraneous circumstances to arouse suspicion, the visiting officer must immediately withdraw and the vessel must be allowed forthwith to proceed upon her course; but if, on the contrary, the ship's papers upon examination afford intrinsic evidence of *mala fides*; or if from the failure of the vessel to reduce speed or shorten sail when signaled to do so, any opposition to the visitation, any attempted concealment, destruction or jettison of papers, any suspicious conduct of the master or of the crew, then the vessel may be subjected to a more minute examination either of documents, or of the officers or members of the crew, or other persons on board, or of the cargo.

Some jurists, including Dr. Martens (Dep. de la Mer, Liv. III, c. VIII.) and Masse, (Droit Com., Liv. II, tit. II, c. II.) limit the right to the simple case where the papers are incomplete or irregular, and Hautefeuille would permit no further investigation than the papers, even where the visiting officer doubts or professes to doubt the genuineness of the papers or the truth of their contents.

In view of the interchange of views between the governments

of the United States of America and England of the alleged abuse by the latter power of the right of search, it is interesting to take notice of the instructions issued by the Navy Department of the former government, on 20th June, 1898, which still remain in force; they are as follows:

12. The belligerent right of search may be exercised without previous notice upon all neutral vessels (It is hardly necessary to state the vessels belonging to the governments of neutral powers are not liable to visit.) after the beginning of the war to determine their nationality, the character of their cargo, and the ports between which they are trading.

13. The right should be exercised with tact and consideration, and in strict conformity with treaty provisions wherever they exist. * * * The officer should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral and trading between neutral ports the examination goes no further. If she is neutral and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war the vessel should be seized; if not, she should be set free, unless by reason of strong grounds of suspicion a further search should seem to be requisite.

The provisions of the declaration of London in relation to contraband have materially increased the risk of inconvenience and loss to neutrals resulting from visitation and search. Although the declaration has not been ratified, and is therefore no part of the law of nations, all the chief maritime powers, including the United States, are signatories thereto, and England, subject to certain modifications and exceptions, has intimated her intention during the present war to be bound by its provisions.

Article 35 of the declaration enacts that the ship's papers shall be proof of the destination of the ship, and this, as we have seen, was the old rule under which, with one or two remarkable exceptions, nations have acted in respect of visitation and search, a rule the general observance of which has secured pleasant relations between neutrals and belligerents; unfortunately M. Renault, the French representative at the conference, imposed a gloss which has rendered this rule wholly illusory. The com-

ment of M. Renault upon this article is:—"It must not be too literally interpreted, for that would make all frauds easy." The question arose, "Is this gloss to be treated as an authoritative exposition of the rule by which naval officers and prize courts may be guided in their conduct and decision?" The English foreign secretary, Sir E. Gray, answers it in the affirmative: he says, "In accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and consequently, foreign government and courts, and no doubt also the international prize court, will continue to interpret the declaration in the light of the commentary given in the report."

It cannot be doubted that by the light of this commentary a naval officer will interpret the rule, as he conceives, in the interest of the belligerent whom he represents rather than of the neutral, and vessels will be, and probably have been, detained for a protracted period, to the serious detriment of ship-owner and merchant, while the cargo is minutely overhauled, even if the greater evil of capture does not ensue. It should, however, be observed that the United States and the other powers were signatories to the declaration to which the commentary was attached, and have taken no exception to the interpretation placed upon it by Sir Edward Grey.

It is further to be observed that, as already stated, the test whether or not the ship is destined to an enemy territory no longer decides her guilt or innocence. Formerly, a ship carrying munitions of war to a neutral port could not be molested, even if it were obvious that they would thence be carried by land or water to the enemy, the sole test was the destination of the ship. By art. 22 of the declaration the destination of the cargo is the test, and "it is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land;" thus, a vessel bound for Rotterdam, in neutral territory, may be captured if the naval officer surmise it is the intention of the shippers that the goods will be sent into Germany. The English government, in a memorandum drawn up for the use of the London conference, defines this process as constituting a "continuous voyage;" it is hardly necessary to

observe that it is totally distinct from "continuous voyage" as defined by Lord Stowell, and as generally conceived by European prize courts. It is true that England so applied the doctrine in the case of *The Bundersrath* during the South African war, on suspicion that the cargo, although the ship was destined to the neutral port of Lorenzo Marques, was intended for the Transvaal government, but Germany induced England to restore and pay compensation. If this new rule be applied with the severity to be anticipated from naval officers, it will be difficult for a neutral state, whose territory adjoins that of a belligerent, to satisfy her own requirements of munition of war or even of civil supplies in goods which are at all suspicious.

Article 33 of the declaration makes conditional contraband liable to capture if it is shown that it is "destined for the use of the armed forces or of a government department of the enemy state," and "this destination is to be presumed if the consignment is addressed to enemy authorities or to a trader (*commercant*) established in the enemy country, where it is well known that this trader supplies articles and materials of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy."

In some respects, a ship carrying things which fall under the designation of conditional contraband is, under the declaration, in a more favorable condition than one carrying things of absolute contraband: the doctrine of continuous voyage does not apply unless the enemy territory has no seaboard, nor would they apparently be liable to capture if destined for the civil government of a colony of the belligerent. On the other hand, M. Renault's commentary would appear to apply, and the time-honoured rule of pre-emption is abrogated, the ship loses its freight and is liable to confiscation. (Report or Declaration of London, cited in Int. Law topics, 1908.)

Very important modifications of the declaration of London are contained in an order of council, dated 29th October 1914, which superseded the order dated August 29th.

(iii) Notwithstanding the provisions of article 35 of the said declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are con-

signed "to order," or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy.

(iv) In the cases covered by the preceding paragraph (iii), it shall lie upon the owners of the goods to prove that their destination was innocent.

Where it is shown to the satisfaction of one of his majesty's principal secretaries of state that the enemy government is drawing supplies for its armed forces from or through a neutral country, he may direct that in respect of ships bound for a port in that country, article 35 of the said declaration shall not apply. Such direction shall be notified in the *London Gazette*, and shall operate until the same is withdrawn. So long as such direction is in force, a vessel which is carrying conditional contraband to a port in that country shall not be immune from capture.

These provisions are drastic, but they adopt the principle laid down by the American prize court in *The Peterhoff* above referred to, namely, that "intention" is to be the true test as to whether a ship is liable to capture and not her destination as evidenced by the ship's papers, and, if so, the fact that the cargo be consigned "to order," or show no consignee, constitutes a cogent piece of evidence for drawing the inference that it is "intended for the supply of the enemy."

The English government protested against the action of the American courts, but Lord John Russell, then foreign secretary, stated that "he was far from pressing hard on the United States," and declined to put any impediment in the way of the capture of British merchant ships, and declared, in spite of strong remonstrances, that he placed full reliance on the justice of the American courts.

There has been much calculation as to what is meant by the phrase, "a place serving as a base for the armed forces of the enemy," whatever might be the intention of the conference, as there are no words of limitation defining whether "base" means "base of operations" or "base of supply;" there can be little doubt that the naval officer of a belligerent would give the latter interpretation to the word base, and thus in effect establish a blockade of a belligerent's entire littoral.

That neutral states during the present war suffer severely from

the partial interdiction of their commercial intercourse with Northern Europe cannot be questioned, neither can it be questioned that England has exercised with extreme severity her international rights against neutral commerce, but hereon the words of a great jurist, Gentilis, written forty years before the work of Grotius was published, may well be quoted: "*Est oequo aequius, et favorabili favorabilius et utile utilius. Lucrum hi commerciorum sibi perire nolunt. Illi nolunt quid fieri quod contra salutem est. Ius Commerciorum oequum est et hoc oequius tuendoe salutis, est illum gentium jus, hoc naturoe est, illud privatorum hoc regnorum.*" We are contending with an enemy who has revived methods of warfare which were all but buried in oblivion, and has applied the inventions of modern science to perpetrate the acts of barbarians, for our enemy it is not a struggle for victory and an honourable peace, but for our subjection and degradation as a state and as a people. Under such circumstances we have a right to expect that neutral governments will extend some measure of toleration for any undue strain imposed by us upon the rights of neutrals. It is the good fortune of our enemy that her naval and geographical situation has only in one conspicuous instance permitted her to violate the rights of neutrals, but therein she has outraged—for by secret engines of destruction, she has made the ocean highways of the world a terror to the peaceful mariner.

L. A. ATHERLEY-JONES,
in the *London Law Magazine and Review*.